

No. 15835

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

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TOPICAL INDEX

PAGE

I.

Substantial legal issues raised by appellant were not considered, or were overlooked, by the court.....	1
Conclusion	5

TABLE OF AUTHORITIES CITED

CASES	PAGE
City of Fresno v. Edmonston, 131 Fed. Supp. 421.....	2
Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68	2
Mickler v. Fahs, 243 F. 2d 515.....	3
Tucker v. United States, 196 Fed. 260.....	3
United States v. Lair, 195 Fed. 47.....	3
United States v. One Chevrolet, 91 Fed. Supp. 272.....	3
United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167	3
STATUTES	
Business and Professions Code, Sec. 2383.....	4
United States Code, Title 28, Sec. 2201.....	2
United States Code, Title 28, Sec. 2283.....	1

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I.

**Substantial Legal Issues Raised by Appellant Were
Not Considered, or Were Overlooked, by the
Court.**

The Court in its Opinion (p. 4) held that The Board of Medical Examiners was a party litigant and that the restriction of the United States Code (28 U. S. C., Section 2283) cannot be avoided by seeking to enjoin a litigant rather than the State Court itself.

However, the Court apparently has overlooked the authorities set forth by appellant in his reply brief (pp. 2-3) to the effect that a State body may be restrained.

Appellant respectfully submits that this is an action to declare the rights of appellant and to restrain an administrative State Board; he does not seek to restrain a State Court.

A Federal Court is not prohibited from restraining and enjoining conduct of administrative proceedings before State bodies or by State bodies.

City of Fresno v. Edmonston (D. C. Cal., 1955),
131 Fed. Supp. 421, 424, 425.

A Federal Court may restrain State Commissions which are not Courts.

Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68, 72.

The Court in its opinion (pp. 4-5) considered the contention of appellant that the District Court has jurisdiction, since it may take action to protect or effectuate its judgment. But then the Court, while stating that appellant's statement in his Opening Brief that the District Court found that the plea of *nolo contendere* did not carry any civil penalties cannot be criticized if the word "found" is used in its non-legal sense; still the Court held that in its legal sense there was no finding that a plea of *nolo contendere* does not carry any civil penalties.

It is submitted by appellant that the District Court has jurisdiction to determine the rights of the parties under Section 2201, Title 28, *United States Code*, which provides that in a case of an actual controversy within its jurisdiction any Court of the United States may declare the rights and other legal relations of any interested party seeking such a declaration.

In the instant case there is an actual controversy within the jurisdiction of the District Court for the Southern District of California, Central Division. The appellant contends that his rights were violated when The State Board of Medical Examiners used a conviction under a plea of *nolo contendere* of a charge pending in the United

States District Court for the purpose of suspending him from the practice of medicine. Whether appellant is correct in his contention is a matter to be determined on its merits by the Trial Court. Here we have a situation where no opportunity is being given the appellant to have the issue determined on its merits.

The Federal Courts have held that a conviction based on a plea of *nolo contendere* cannot be used in any other case; cannot be considered in disposing of issues in a civil action, and that it cannot be used as an admission in any civil suit for the same act.

Mickler v. Fahs (C. C. A. 5th), 243 F. 2d 515, 517;

United States v. Lair (C. C. A. 8th), 195 Fed. 47, 52;

United States v. One Chevrolet, 91 Fed. Supp. 272, 275;

Tucker v. United States (C. C. A. 7th), 196 Fed. 260, 262;

United States v. Standard Ultramarine and Color Co. (D. C. N. Y.), 137 Fed. Supp. 167, 170.

Appellant contends that a sense of justice and fair play requires that he be given the opportunity to have a Trial Court determine whether in equity there was a finding by the Federal District Judge that a plea of *nolo contendere* does not carry with it any civil penalties. For if the contention of appellant is correct that in equity there was such a finding, then the District Court has the right to protect or effectuate its judgment in this case.

The Court in its Opinion (p. 6) holds that The Board of Medical Examiners did what the Federal District Judge anticipated the Board would not do, to-wit, suspend the license of the appellant because of a conviction follow-

ing a plea of *nolo contendere* made to a charge of a felony.

What has been completely overlooked is that the first portion of Section 2383 of the *California Business and Professions Code* refers to

“The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct.”

The significant thing is that the section goes on to read

“A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section.”

It should be noted that where there is a comma after the word “felony” in the first portion of the section, when talking about the conviction of a felony or of an offense involving moral turpitude that there is no comma after the word “felony” when the section speaks of using a conviction following a plea of *nolo contendere*. Therefore it is necessary that there be a showing of moral turpitude where a plea of *nolo contendere* is used as the basis of a conviction. This is reasonable and logical because there is a distinction between a plea of *nolo contendere* and a plea or verdict of guilty. The plea of *nolo contendere* admits the facts but denies the criminal intent. In the present case, there is a stipulation on file that the Board in its action against Dr. Furnish “did not seek to discipline the said appellant for the conviction of an offense involving moral turpitude.”

The Court in its Opinion (p. 7) stated that the Court held the constitutional proscription against *ex post facto* laws was no bar to the disciplinary action.

It is submitted that under the authorities cited by appellant in his opening brief (pp. 8-10) clearly indicate that an *ex post facto* law was used to suspend Dr. Furnish from the practice of medicine.

Conclusion.

Wherefore, appellant urges that this Petition for Rehearing be granted so that the authorities presented by appellant and his position may be reconsidered to the end that the District Court should proceed with a hearing on the merits of the case rather than deny Dr. Furnish an opportunity of having his rights declared and determined.

Respectfully submitted,

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By MURRAY M. CHOTINER,
Attorneys for Appellant.

Certificate of Counsel.

Murray M. Chotiner, one of counsel for appellant, hereby certifies that in his judgment the within Petition for Rehearing is well founded and is not interposed for delay.

MURRAY M. CHOTINER.

